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FILED
OCT 16 1899

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Oct. 16, 1899

No. 203.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

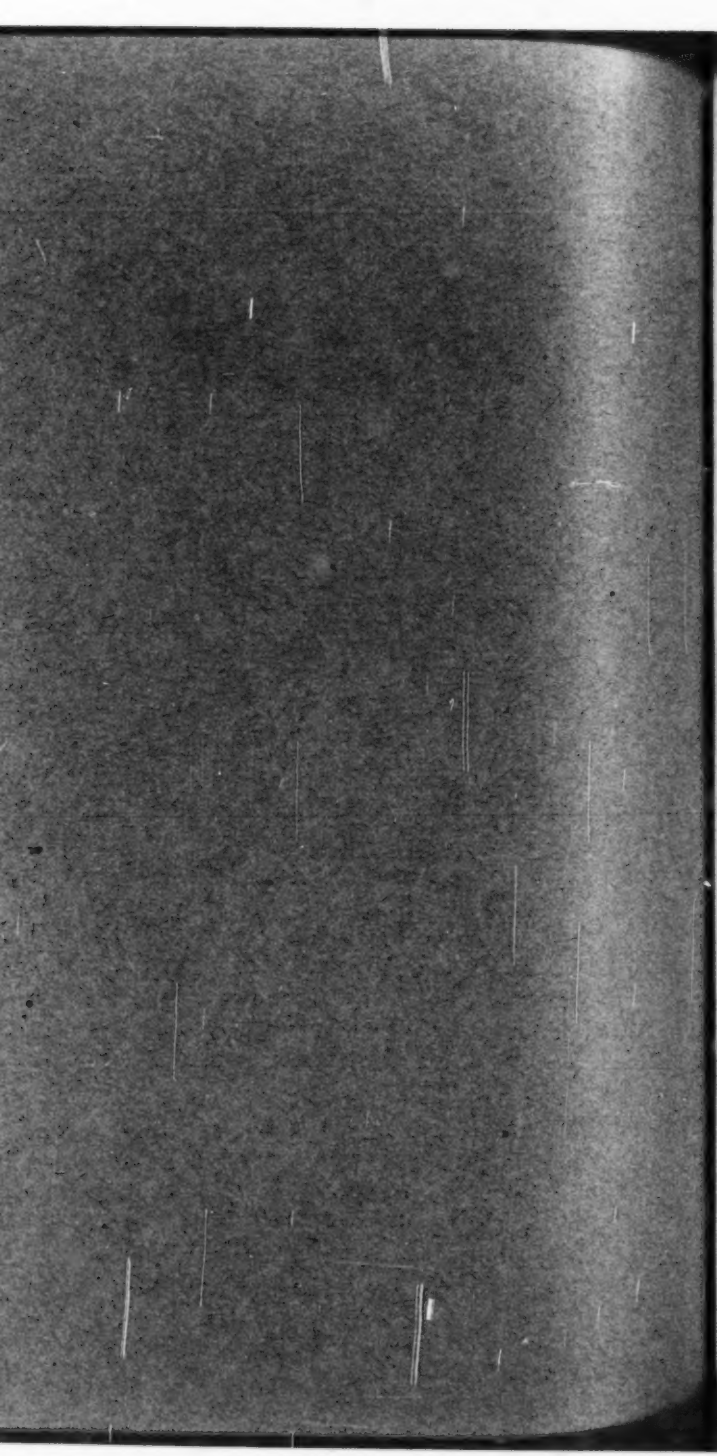
THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals,
Fourth Circuit.

Brief for Plaintiff in Error,
OCTOBER 16, 1899.

Points Assigned by the Plaintiff in Error why the Motion of the Defendant in Error, to Dismiss the Writ of Error or to Modify the Supersedeas heretofore Granted, Should be over-ruled and the cause heard upon its merits when reached on the Court docket.

ROBERT STILES, RICHMOND, VA.,
ADDISON L. HOLLADAY, RICHMOND, VA.,
Counsel for Plaintiff in Error.



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Brief for Plaintiff in Error,
OCTOBER 16, 1899.

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uld be over-ruled and the cause heard upon
merits when reached on the Court docket.

ollowing notice of a motion to be made by the defen-
error, the Postal Telegraph-Cable Company, in the
yled cause in this Honorable Court on the 16th day of
, 1899, has been served on the undersigned counsel for
ntiff in error, the Southern Railway Company (caption
motion being omitted), viz:

Motion by the Defendant in Error to Dismiss.

mes the defendant in error, the Postal Telegraph-Cable Company,
McIntosh, counsel, and moves the court to dismiss the writ of error
ause, (1) because this court has no jurisdiction of the same:
e motion is not sustained, then that the supersedeas upon the
rror from this court be modified, so that during the pendency of the
ill not prevent or hinder the defendant in error from occupying the
appropriated for its use and proceeding to erect and operate its
legraph thereon pending said writ of error.

(Signed) J. R. McINTOSH,
Attorney for Defendant in Error.

s. STILES & HOLLIDAY,
Attorneys of Record for Plaintiff in Error in the above entitled case:

e hereby notified that the defendant in error in the above named
ll, on Monday, the 16th day of October, A. D., 1899, on the meeting
upreme Court of the United States, on that day, or as soon thereafter
el can be heard, submit for the consideration of the court the fore-
otion, and the brief thereon hereto attached.

(Signed) J. R. McINTOSH,
Atty. for Defendant in Error.

May 19th, 1899, counsel for the Postal Telegraph-Cable
any caused notice to be served on counsel for the Southern
y Company, that the above motion would be made be-
is honorable court on May 22, 1899.

May 22, 1899, counsel for the plaintiff in error appeared,
y leave of court, filed a printed brief, respectfully sub-
g that the notice of said motion was illegal and unsuffi-
and on the same day the defendant in error appeared
nsel before this court, and—while submitting the above

thdrew its motion to dismiss the writ of error allowed
ff in error; but moved the court to vacate or modify
eas.

norable court adjourned without action upon appel-
n.

ber 10, 1899, counsel for the Southern Railway Co.
f court) filed a printed brief of fifty pages, resisting
motion to vacate or modify the supersedeas in this
in that brief necessarily discussed the question of
presented by the present motion of the appellee.

**ted brief filed for the plaintiff in error on October
ontained the following statement on page 8, viz:**

the ruling of this court in *Bohanan* v. *Nebraska*,
231, and other like cases, that 'the court will not con-
nerits of the question involved in a case on a motion
unaccompanied by a motion to affirm'—we cannot
appellee's motion to vacate the supersedeas awarded
se, discuss the merits of the controversy—*i. e.*, the
al proposition of appellant that there is no law in
nder which a telegraph company may, in North
ondemn a right of way for its purposes upon the
d constituting the roadway of a railroad; the con-
appellant that, by legislation subsequent to the
the Code of North Carolina of 1883, the legislature
te has repealed (as to telegraph condemnations) the
er which appellee founds its application to condemn
y of appellant. These, with many other vital ques-
to the merits of the controversy, presented in the
of errors, must await a hearing upon the merits.
counsel will endeavor to avoid violation of the rule
in *Bohanan* v. *Nebraska*, 118 U. S., 231; but, in re-
ellee's motion to vacate the above supersedeas, it
cessary to analyze the orders of the Circuit Court
eptember 15, 1898, and October 24, 1898, and show
determine upon their face, in order to demonstrate

appellant's contention that the order of October 24, 1898, was a final order, and that a supersedeas properly followed a writ of error thereto."

Having, in our brief filed October 10, 1899, fully discussed the jurisdiction of this court and the finality of the order to which a writ of error and supersedeas have been allowed and perfected, and having in that brief answered all the points discussed in appellee's brief, which accompanies its motion now made (October 16, 1899), it would be a work of supererogation to go over the same ground a second time. We therefore adopt our brief filed October 10, 1899, and ask this honorable court to consider and treat that brief as the reply of the plaintiff in error, the Southern Railway Company, to the brief of the defendant in error, the Postal Telegraph Cable Company, which accompanies its said motion of October 16, 1899.

The record in this cause, marginal page 96, shows that on November 29, 1898, the Circuit Court, held by the Honorable Nathan Goff, Circuit Judge, allowed a writ of error and supersedeas from the Circuit Court to the Circuit Court of Appeals, which was duly perfected (see marginal pp. 102 to 109, inclusive), and, during the whole pendency of that appeal in the Circuit Court of Appeals, the writ of error operated as a supersedeas, as may be seen from the record including the order of the Circuit Court of Appeals signed by Honorable Nathan Goff, the presiding Judge (record, marginal page 120), from which the following extract is made:

"This cause having been called in the regular order for argument and the defendant in error having moved the court to dismiss the writ of error, the said cause was argued generally, by counsel, on the transcript of the record as well as upon the motion to dismiss."

The order allowing the present writ of error and supersedeas was made on May 4th, 1899, and the supersedeas bond

in the penalty of $5,000.00 with the Virginia Trust Company as security, was then taken and approved by Honorable Nathan Goff, Circuit Judge, who had, after full argument, allowed the writ of error to operate as a supersedeas—from the Circuit Court to the Circuit Court of Appeals—had presided at the full and extended hearing in the latter court—had entered a subsequent order in the Circuit Court—who was cognizant of all subsequent action in the cause, and upon whose action, in making the order allowing a writ of error and supersedeas, taking and approving the supersedeas bond, and signing a citation and writ of error, intended to operate as a supersedeas, the Chief Justice of this Honorable Court based his action, in signing the present writ of error to operate as a superdeas and approving the supersedeas bond, already approved by Honorable Nathan Goff, Circuit Judge, and signing the existing citation herein.

No question has been raised by the defendant in error either as to the amount of the supersedeas bond or the sufficiency of the security thereon. A vacation or modification of the supersedeas to-day, or at any future time, prior to a hearing upon the merits, would subject the plaintiff in error to irreparable injury; and the construction of the telegraph lines of the defendant in error pending the appeal, would, as stated in the answer of the Southern Railway Company, to which the Postal Telegraph-Cable Company demurred—"grossly imperil the safe operation of defendant's railroad and grossly obstruct or hinder the usual travel thereupon."

We respectfully submit that it was right and proper that the writ of error from the Circuit Court to the Circuit Court of Appeals should operate as a supersedeas while the cause was pending in that court, and in view of the action taken by Judge Goff in granting the writ of error to operate as a supersedeas from the Circuit Court of Appeals to this Honorable Court with full knowledge of all facts and circumstances connected with the case in its various aspects, and of the legal effect of the order of the Circuit Court of October 24th, 1898,

upon the rights and property of appellant, that this Honorable Court should not dismiss the writ of error and should not vacate or modify the supersedeas, but should permit the case to come to a hearing upon the merits.

Respectfully submitted,

ROBERT STILES,
ADDISON L. HOLLADAY,
Counsel for Plaintiff in Error

October 16, 1899.